IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4465 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 4465 of 2004
MR AMAR P DAVE for Petitioner No. 1
MS DHARMISHTA RAVAL for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA
Date of decision: 28/04/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Ms Dharmishta Raval, learned senior standing counsel for the Central Government waives services of Rule on behalf of the respondents.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. What is challenged in this petition under Article 226 of the Constitution is the order-in-appeal No.68 dated 23.10.2002 passed by the Commissioner (Appeals), Central Excise & Customs, Surat arising from the order-in-original No.99 dated 16.7.2001 passed by the Deputy Commissioner, Central Excise & Customs, Division-I, Vapi by which the appellate authority reduced the amount of penalty under Rule 96ZQ(5)(ii) of the erstwhile Central Excise Rules, 1944 from Rs.4,50,000/= to Rs.2,25,000/-.

3. The facts leading to this petition are as under:-

3.1 The petitioner-assessee was having one Hot Air Stenter Machine containing five chambers upto the month of November, 1999 and was paying Central Excise Duty as per Section 3A of the Central Excise Rules, 1944 on the basis of capacity of production. The petitioner installed one new Hot Air Stenter Machine containing three chambers and started production from 2.12.1999 as informed by them vide letter dated 2.12.1999. Therefore, the petitioner was required to pay Central Excise Duty of Rs.12,00,000/- per month at the rate of Rs.1,50,000/- per chamber as per Rule 96ZQ(1) of the Central Excise Rules, 1944. As per Rule 96ZQ(3), the amount of duty payable under sub-rule (1) shall be paid by the 15th of each calendar month. For the month of December, 1999, the petitioner paid the duty amounting to Rs.7,50,000/= on 15.12.1999 and the balance of Rs.4,50,000/= on 24.12.1999. In view of the above, respondent No.3 issued show cause notice dated 10.5.2000 alleging that the petitioner had failed to pay the Central Excise Duty within the time prescribed in Rule 96ZQ(3) of the Central Excise Rules, 1944 and was called upon to show cause whey the maximum penalty equal to the amount of duty Rs.4,50,000/- should not be levied.

3.2 The petitioner submitted its reply dated 24.10.2000 stating that due to financial crisis in the market, the petitioner could not deposit the balance duty amount of Rs.4,50,000/- on 15.12.1999 and that the petitioner had already deposited Rs.3,995/- on 28.9.2000 being the amount of interest for delayed payment of duty.

After considering the reply, the Deputy Commissioner of Central Excise imposed penalty of Rs.4,50,000/- under the aforesaid Rule after confirming

that the amount of interest of Rs.3,995/- was already paid by the petitioner on 28.9.2000 under Rules 96ZQ(5)(i) of the erstwhile Central Excise Rules, 1994.

3.3 The petitioner went in appeal. The said appeal was heard with 17 other appeals including another appeal filed by this very petitioner against another similar order passed by the Deputy Commissioner imposing penalty of Rs.24,00,000/-. We are not concerned with the said order in the present petition.

At the hearing of the appeals, the petitioner and the other appellants relied on the decision dated 22.7.2002 of this Court in Special Civil Application No.5789 of 2002 (Bajaj Fashions Pvt. Ltd.) laying down that the penalty stipulated in Rule 96ZQ(5)(ii) is the maximum penalty; the Rule was required to be read in a reasonable manner and that the assessing authority has the discretion to levy lesser amount depending upon the facts and circumstances of each case. This Court also relied on the decision of the Apex Court in Hindustan Steel Ltd. vs. State of Orissa, AIR 1970 SC 253 laying down the principle that the penalty cannot be imposed merely on account of failure to comply with the procedural provisions.

After referring to the said decision, the Commissioner (Appeals) considered the plea of the appellants in all cases and found that the appellants were facing acute financial hardship and that their abatement claims were also not sanctioned immediately. The Commissioner (Appeals) also recorded the finding that the appellants had paid the entire duty amount alongwith interest. After giving the finding that the penalties imposed were high, the Commissioner (Appeals) reduced the penalty in all cases by 50% including the penalty in the two appeals of the present petitioner.

4. In this petition, we are concerned with the order-in-appeal No.68 arising from the order-in-original No.99. The assessing officer has imposed penalty of Rs.4,50,000/-. The appellate authority reduced the penalty to Rs.2,25,000/-. The present petition challenges the said appellate order in so far as the entire penalty is not set aside.

5. Mr Amar P Dave, learned counsel for the petitioner has submitted that although the appellate authority has reduced the penalty by 50%, the appellate authority has not really considered the principles laid down by this Court in the case of Bajaj Fashions Pvt.

Ltd. (Supra) and in the decision of the Apex Court in the case of Hindustan Steel Ltd. (Supra). Instead of looking into the facts of each individual case, the appellate authority has simply applied the rule of thumb and reduced the penalty by 50%. The appellate authority has not considered the facts of the present case that there was delay of only nine days in paying the duty and that out of the duty amount of Rs.12,00,000/- payable by 15.12.1999, the petitioner did pay Rs.7,50,000/- on 15.12.1999 and that the balance amount of Rs.4.50,000/= was paid on 24.12.1999. The learned counsel has, therefore, submitted that in the facts of the instant case even the penalty of Rs.2,25,000/- is too harsh as the entire penalty ought to have been set aside.

6. On the other hand, Ms Dharmishta Raval, learned senior standing counsel for the Central Government has submitted that since the appellate authority has very much considered the principles laid down by this Court and has also referred to the financial hardships of the appellant, it is not for this Court to sit in appeal over the decision of the appellate authority and to interfere with the quantum of penalty already determined by the appellate authority which has given a substantial reduction of 50%.

7. Having heard the learned counsel for the parties, we are of the view that while the learned senior standing counsel would be right in her submission if we were to interfere with the quantum of penalty by a small margin here or there. What has happened in the instant case is that out of the excise duty of Rs.12,00,000/- payable by 15.12.1999, the petitioner had already paid Rs.7,50,000/by due date i.e. by 15.12.1999 and even for payment of Rs.4,50,000/-, there was delay of only nine days for which the petitioner has already paid interest of Rs.3,995/- as acknowledged by the assessing officer in the order-in-original. While the principles laid down by this Court in Bajaj Fashions Pvt. Ltd. (Supra) have already been quoted by the appellate authority in para 6 of the impugned order, it is also necessary to refer to the principles laid down by the Apex Court in Hindustan Steel Ltd. vs. State of Orissa, AIR 1970 SC 253 particularly in para 7 of the said decision which reads as under :-

"7. Under the Act penalty may be imposed for failure to register as a dealer : Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer.

> An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

8. While we would not agree with the learned counsel for the petitioner that in the facts of the present case no penalty ought to have been levied by the authorities, considering the fact that a substantial amount of duty was paid by the due date and there was delay of only nine days in paying the balance amount, we are of the view that even the penalty of Rs.2,25,000/- is too harsh and disproportionate for the delay of nine days, that too when the appellate authority has accepted the petitioner's case that it was facing financial hardship which resulted into delay of nine days in paying the balance amount of Rs.4,50,000/- after having paid a substantial amount of Rs.7,50,000/- by the due date.

9. The next question is whether the matter should be remanded to the assessing officer or the appellate authority for determining the amount of penalty afresh.

At this stage, Mr Dave, learned counsel for the petitioner has submitted that this will not put an end to the petitioner's agony because another arbitrary order oblivious of the spirit underlying the principles laid down by this Court in Bajaj Fashions Pvt. Ltd. and by the Apex Court in Hindustan Steel Ltd. may be passed and

the petitioner will be dragged into another round of litigation.

On the other hand, Ms Raval, learned senior standing counsel has submitted that the object of levying penalty, over and above interest, is to ensure deterrent effect on the assessees, and that it would not be appropriate for this Court to determine the amount of penalty to be levied in each individual case. At the most, some rational guidelines or parameters may be indicated so that the authority can take them into consideration in other cases under the same Rule 96ZQ(5)(ii).

10. At the relevant time, sub-rule (5) of Rule 96ZQ of the erstwhile Central Excise Rules, 1944 as amended by notification dated 28.2.1999 read as under :-

"(5) If an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to,-

(i) pay the outstanding amount of duty along with interest at the rate of thirty-six per cent per annum calculated for the outstanding period on the outstanding amount; and

(ii) a penalty equal to an amount of duty outstanding from him or rupees five thousand, whichever is greater."

11. Having heard the learned counsel for the parties, we are of the view that since Rule 96ZQ(5)(i) provided for levy of interest on delayed payment and sub-rule (ii) provided for penalty for such delay, in the context of Rule 96ZQ(5) the quantum of penalty cannot be disproportionate to the length of the delay in payment of duty. Looking to the fact that the rule making authority itself has provided for maximum penalty equal to an amount of duty outstanding from the assessee or Rs.5,000/- whichever is greater, the amount of penalty would be 100% if the delay in payment is by one year or even by two years. Looking to the object of penalty under Rule 96ZQ(5), the authorities would be guilty of total non-application of mind, if the period of delay is overlooked or if past history of regularity or otherwise in payment of duty is not considered while determining the quantum of penalty. Penalty for delay of nine days can not be the same as penalty for the delay of one year

in paying the excise duty. Since the rate of interest stipulated in sub-rule (i) is 36% per annum calculated for the outstanding period on the outstanding amount, the hundred percent penalty will be three times the amount of interest (36% x 3 = 108%). This means, the penalty should not be at a rate higher than 100% per annum calculated for the outstanding period on the outstanding amount. It, therefore, appears to us that the formula of penalty not exceeding three times the amount of interest levied would not only be commensurate with the extent of delay in payment of the outstanding amount, but would also achieve the object underlying Rule 96ZQ(5).

It is clarified that these observations are limited to the question of penalty to be levied under clause (ii) of sub-rule (5) of Rule 96ZQ because the penalty is only for the delay in payment of duty. This principle would obviously not apply under other Rules where the penalty is to be imposed for playing fraud or for suppression of facts or for clandestine removal of goods.

12. The petition is accordingly allowed. The impugned order-in-original No.99 dated 16.7.2001 (Annexure "A") and the order-in-appeal No.68 dated 23.10.2002 (Annexure "B") are quashed and set aside. Respondent No.3 shall decide the matter afresh in accordance with the principles laid down in this judgment.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

sundar/-